Office-Supreme Court, U.S.
FILED
APR 2 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1178

FRED SAIGH and ELIZABETH SAIGH, by Relation to ANHEUSER-BUSCH, INC., a Corporation,
Petitioners,

vs.

AUGUST A. BUSCH, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the St. Louis Court of Appeals.

LON HOCKER,
411 North Seventh Street,
St. Louis, Missouri 63101,
MAin 1-6100,
Attorney for Petitioners.

HOCKER, GOODWIN & MacGREEVY,
411 North Seventh Street,
St. Louis, Missouri 63101,
MAin 1-6100,
Of Counsel.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Prayer	1
Opinion below	1
Jurisdiction	2
Questions presented	2
Laws involved	3
Statement of the case	4
Argument	10
Conclusion	14
Appendix—Opinion and judgment of St. Louis Court of Appeals	15-44

Cases Cited.

Bouie v. City of Columbia, 378 U. S. 347, 354, 84 S. Ct. 1697, 1703, 12 L. Ed. 2d 894 (1964)	11
Leggett v. Missouri State Life Insurance Company, 342 S. W. 2d 833, 851 (1960)	10
Merrill v. Davis, 359 Mo. 1191, 1201, 225 S. W. 2d 763, 768 (1950)	10
Santa Fe Hills Golf & Country Club v. Safehi Realty Company, 349 S. W. 2d 27, 34 (1961)	10
Surowitz v. Hilton Hotels Corporation, 34 Law Week 4196, 4198, 86 S. Ct. 845, 850	11, 13

Statutes Cited.

Constitution of the United States, Amendment XIV, Section 1	3, 7, 13, 14
Rule 23(b), F. R. C. P.	11, 12, 13
Rule 52.08(b), Missouri Rules of Civil Procedure (4 R. S. Mo. 4963, 2 V. A. M. R. 98)	3, 12, 13
28 U. S. C § 1257(3)	2

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. .....

FRED SAIGH and ELIZABETH SAIGH, by Relation to ANHEUSER-BUSCH, INC., a Corporation,
Petitioners,

vs.

AUGUST A. BUSCH, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the St. Louis Court of Appeals.

Fred Saigh and Elizabeth Saigh, petitioners, pray that a Writ of Certiorari issue to review the judgment of the St Louis Court of Appeals entered on September 21, 1965.

OPINION BELOW.

The opinion of the St. Louis Court of Appeals is reported at 396 S. W. 2d 9. A copy of the Opinion and a copy of the Judgment are appended to this Petition as Exhibit A and Exhibit B, respectively.

JURISDICTION.

The judgment sought to be reviewed was entered by the St. Louis Court of Appeals on September 21, 1965. Petitioners' Motion for Rehearing or to Transfer Cause to the Supreme Court of Missouri was overruled by the St. Louis Court of Appeals on October 20, 1965. Petitioners' Motion to Transfer was overruled by the Supreme Court of Missouri on December 13, 1965. On March 11, 1966, this Court entered an Order extending the time for filing a Petition for Writ of Certiorari to and including April 11, 1966.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

I.

Are minority shareholders deprived of Fourteenth Amendment rights by a State Court's dismissal **with prejudice**, without a trial and without opportunity for pre-trial discovery, of their shareholders' derivative action for the recapture of excessive compensation given to their corporation's President, Chairman and Chief Executive Officer, on the ground that their petition did not allege that they had first sought relief from the shareholders, when under applicable State law such relief as that sought cannot be afforded by shareholder action?

II.

Can a State Court within the requirements of the due-process clause of the Fourteenth Amendment dismiss with prejudice a stockholder's derivative suit for failure to allege sufficient reasons for not seeking stockholder action,

on the ground that the only judicially cognizable excuse for not first seeking relief from shareholders is ownership or control by the defendant and the Board of Directors of a majority of the corporation's stock?

LAWS INVOLVED.

Section 1 of Amendment XIV of the Constitution of the United States provides in part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 52.08(b) of the Missouri Rules of Civil Procedure (4 R. S. Mo. 4963, 2 V. A. M. R. 98), provides as follows:

> "In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the petition shall aver that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law. The petition shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees, and, if necessary, from the shareholders, such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

STATEMENT OF THE CASE.

This is a stockholder's derivative action filed by petitioners on May 7, 1963 (T. 2). Since January 1, 1954, and at the time of the filing of this suit, petitioner Fred Saigh owned 30,000 shares and petitioner Elizabeth Saigh owned 1,600 shares of the common stock of Anheuser-Busch, Inc. (Stipulation Par. 2(B)).

The Petition was filed in two counts (T. 2-6). Count I sought rescission of the sale of certain stock to the defendant, August A. Busch, Jr., President of Anheuser-Busch, Inc. (T. 4-5; Stip. Par. 2(C)). Count I is not involved in this Petition for Writ of Certiorari, having been severed for purposes of trial and appeal (T. 36a). Count II sought to recover for the corporation all benefits received by Mr. Busch in excess of a reasonable salary as President (T. 11).

On November 21, 1963, Mr. Busch filed a Motion to Dismiss Count II of petitioners' Second Amended Petition on the ground that "plaintiffs failed to allege in Count II of said Second Amended Petition that plaintiffs have sought relief from the other shareholders of the nominal defendant, Anheuser-Busch, Inc., or to state facts showing why plaintiffs failed to seek such relief; . . ." (T. 48).

On December 18, 1963, petitioners amended Count II of their Second Amended Petition to allege that the action which they sought could not be obtained from the stockholders because (a) such action was only within the power of the Board of Directors and not within the power of the stockholders, and (b) it was impossible for petitioners to secure the election of a different Board of Directors to obtain the desired action because Mr. Busch and the Board of Directors (i) controlled large blocs of stock, (ii) controlled the communications between the corporation and its large number of stockholders, (iii) have refused to list

the stock on a national securities exchange, with the result that proxy solicitations are not subject to the rules of the Securities and Exchange Commission, (iv) escaped disclosure of executive compensation by avoidance of the proxy solicitation rules, (v) escaped the necessity of mailing opposition proxy material and of including stockholder proposals in management's proxy material, by avoidance of the proxy solicitation rules, and (vi) have the benefit of soliciting proxies at corporate expense, as opposed to the great cost of a personal proxy solicitation at individual expense (T. 49, 53-55).

On December 18, 1963, Mr. Busch refiled his Motion to Dismiss petitioners' Second Amended Petition as amended (T. 56).

On January 20, 1964, the Circuit Court entered its Order, as amended on January 23, 1964, sustaining Mr. Busch's Motion to Dismiss and dismissing Count II of petitioners' Second Amended Petition *with prejudice* (T. 58-60).

Petitioners' Application for Leave to Amend Count II of their Second Amended Petition was denied on January 30, 1964 (T. 61-62). Their Motion for a New Trial was overruled on February 21, 1964 (T. 80-81).

Petitioners' Motion for a New Trial (T. 62-63) reads in part:

"Motion for New Trial as to Count II.

"Plaintiffs move the court to order a new trial in the above action as to Count II, and for grounds of this motion state:

"The court erred in sustaining the motion of defendant August A. Busch, Jr. to dismiss Plaintiffs' Second Amended Petition as amended and in dismissing said count thereof with prejudice, for the following reasons:

"1. The plaintiffs in said count did in law state a claim upon which relief could be granted; since

"(a) It was not 'necessary' for the plaintiffs to allege efforts to secure from the shareholders the action they desire, or the reasons for not making such effort; since the shareholders have no legal power to afford such relief; and

"(b) The plaintiffs did allege in said count the reasons for not making efforts to secure from shareholders the action they desire.

"2. The sole ground asserted by defendant Busch's motion was failure 'to state a cause of action', which is not required of a petition under the rules governing civil procedure in the Circuit Courts. The order was therefore without legal basis.

3. The court erred in entering a final judgment of dismissal with prejudice on sustaining the motion to dismiss; and foreclosing plaintiffs' right to apply for leave to amend, and adjudicating the case on the merits without affording plaintiffs an opportunity to be heard, in violation of the due process of law guaranties of both Missouri and the United States Constitutions.

"4. The court erred in dismissing the count with prejudice while there were pending interrogatories directed to the defendant corporation's directors, thus aborting the answers thereto, which would have produced information upon which could have been predicated more specific allegations of the reasons for plaintiffs' not making efforts to secure from shareholders the action they desire . . ."

Petitioners' brief as appellants in the St. Louis Court of Appeals, a certified copy of which accompanies this

Petition as part of the transcript again relied upon Amendment XIV, United States Constitution, as follows:

> "1. The Court erred in sustaining defendant Busch's motion to dismiss, because the predicate of the motion 'That the plaintiff failed . . . to state facts showing why plaintiffs failed to seek [shareholder] relief' was simply untrue.
>
> Gattesman v. General Motors Corporation, 268 F. 2d 194 (2d Cir., 1959);
> Merrill v. Davis, 159 Mo. 1191, 1201, 225 S. W. 2d 763 (Mo. Sup. 1950);
> Rule 52.08 (b), Missouri Rules of Civil Procedure;
> Crawford, Earl T., Class Actions under the Missouri Code, 18 Kansas City Law Review 103 (Apr. 1950), quoted V. A. M. S., § 507.070, page 364;
> V. A. M. S., §§ 351.310, 351.360 (Mo. R. S. 1959);
> Rule 67.05, Missouri Rules of Civil Procedure;
> United States Constitution, Amendment XIV;
> Missouri Constitution, Article I, Section 10" (Appellants' Statement, Brief and Argument II).

On September 21, 1965, the St. Louis Court of Appeals affirmed the dismissal with prejudice of Count II, and on October 20, 1965, overruled petitioners' Motion for Rehearing or to Transfer Cause to the Supreme Court of Missouri. Petitioners then filed in the Supreme Court of Missouri their Motion to Transfer and Suggestions in Support, a certified copy of which accompanies this Petition as part of the transcript. The Motion posed the questions:

> "1. Whether, in ruling that *it is necessary* in a derivative shareholders' action under Civil Rule 52.08 (b) (Op. 8) for restitution of excessive compensation (Op. 7) granted to its President, Board Chairman and Chief Executive Officer, by a Board of Directors under

his influence and control (Op. 4, 5), that plaintiffs *'submit their grievance to the body of stockholders before bringing this action'* (Op. 21) the Court of Appeals has failed to follow the following last controlling decisions of the Supreme Court which hold that the body of shareholders of a corporation as such have no power by resolution to determine what is reasonable compensation of officers employed by their Board of Directors, nor to file suit to recover an excess.

Merrill v. Davis, 359 Mo. 1101, 225 S. W. 2d 763;
Santa Fe Hills Golf and Country Club v. Safehi Realty Co., 149 S. W. 2d 27;
Leggett v. Missouri State Life Ins. Co., 342 S. W. 2d 833.

"2. Whether, in *thus requiring an impossibility* of plaintiff as a requisite to this type of action, the Court of Appeals has deprived plaintiffs and the nominal defendant of due process of law and the equal protection of the laws under U. S. Constitution Amendment XIV, and of equal rights and opportunity under the law and of due process of law under Art. I §§ 2 and 10, Constitution of Missouri." (Motion to Transfer and Suggestions in Support 2-3; Emphasis in original).

The Motion to Transfer was overruled on December 13, 1965.

On March 11, 1966, petitioners filed, and this Court sustained, their Application for Extension of Time Within Which to File Petition for Writ of Certiorari. The Application stated:

"While petitioner did rely upon Amendment XIV, Const. U. S., in support of its claim to the right to discover the true facts and to be heard on the merits

in its brief in the appeal of this case, nevertheless under then published relevant opinions of the U. S. Supreme Court, it did not appear sufficiently likely that this Court would entertain a petition for certiorari to review the Missouri judgment of dismissal. However, the **Surowitz** opinion announces that the right of a minority shareholder to establish by discovery facts necessary to support the requirements of the rule in a shareholder's derivative action brought in good faith, is a part of 'an honest and fair judicial system', and it, therefore, appears, in the light of **Surowitz**, that the right may indeed be one federally protected under the due process clause of U. S. Constitution Amendment XIV, as requiring an 'honest and fair judicial system' not only of the Federal Government, but also of the States themselves." (Application 3).

ARGUMENT.

I.

In **Merrill v. Davis**, 359 Mo. 1191, 1201, 225 S. W. 2d 763, 768 (1950), the Supreme Court of Missouri held as follows:

> "The control of litigation and the decision to litigate or not is in the directors, and, until they improperly fail or refuse to sue or defend in the corporate name, the stockholders cannot do so, and then must sue in right of the corporation in equity making a case of wrongful refusal to sue."

In **Santa Fe Hills Golf & Country Club v. Safehi Realty Company**, 349 S. W. 2d 27, 34 (1961), the Supreme Court of Missouri held as follows:

> "Where the management and control of a corporation is vested by statute and the corporate bylaws in the board of directors, the board's action with respect to the affairs of the corporation is controlling and exclusive, and the shareholders are without lawful authority to control the directors in the exercise of the judgment vested in them."

See, also, to the same effect, **Leggett v. Missouri State Life Insurance Company**, 342 S. W. 2d 833, 851 (1960).

The St. Louis Court of Appeals did consider petitioners' contention that, in light of these decisions, it was beyond the power of the stockholders as a body to recover excessive compensation allegedly paid to Mr. Busch (Appendix to this Petition pp. 30-33, Op. 18-22, 396 S. W. 2d 18-21). Then, in the face of the above decisions of the Supreme Court of Missouri holding that only the Board of Directors could institute litigation in behalf of the corporation, and in total disregard of petitioners' argument that

ratification was the very antithesis of "such actions as he desires [they desire]", the St. Louis Court of Appeals held that "the stockholders have the right to consider the matter and **ratify**, if they wish, any act of the directors, provided the act is not ultra vires, illegal or fraudulent (Appendix p. 33, Op. 21, 396 S. W. 2d 21), and affirmed the dismissal because petitioners had not sought ratification of what they were objecting to.

By thus retroactively reducing the right to institute a stockholder's derivative suit in a matter where the stockholders cannot act as a body to nothing more than the right to seek stockholder ratification of the very acts complained of, the St. Louis Court of Appeals has denied petitioners due process of law.

> "The basic due process concept involved is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question. [Citing authorities] . . . When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.'" **Bouie v. City of Columbia**, 378 U. S. 347, 354, 84 S. Ct. 1697, 1703, 12 L. Ed. 2d 894 (1964).

II.

On March 7, 1966, this Court decided **Surowitz v. Hilton Hotels Corporation**, 34 Law Week 4196, 86 S. Ct. 845. **Surowitz** held that the verification requirement of Rule 23(b), F. R. C. P., does not compel summary dismissal of a stockholder's derivative suit merely because the complaining

stockholder did not in fact understand the legal relationships or business transactions alleged in her complaint.

The St. Louis Court of Appeals held that the reasons alleged by petitioners for not seeking relief fom the stockholders were insufficient (Appendix p. 34, Op. 23, 396 S. W. 2d 21). The Court identified as the "principal inadequacy" of the Petition the failure to allege "that the defendant Busch and the board of directors owned or controlled the majority of the shares of the stock of the nominal defendant . . ." (Appendix p. 42, Op. 32, 396 S. W. 2d 25). Thus, the St. Louis Court of Appeals has held, apparently for the first time in any State or Federal Court, that the only acceptable "reasons for not making such effort", i. e., "to secure . . . if necessary, from the shareholders, such action as he desires" under Missouri Rule 52.08(b), which is verbatim in this respect with Federal Rule 23(b), is ownership or control by the individual defendant and his controlled Board of Directors of a majority of stock. Such a holding not only ignores common knowledge of modern corporate life, that control of a majority of stock is not necessary to control a large publicly held corporation. The more important effect of such a holding is that, in allowing only a single reason for not seeking stockholder relief, it effectively denies petitioners a hearing.

> "Rule 23(b) was not written in order to bar derivative suits. Unquestionably it was originally adopted and has served since in part as a means to discourage 'strike suits' by people who might be interested in getting quick dollars by making charges without regard to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them. On the other hand, however, derivative suits have played a rather important role in protecting shareholders of corporations from the designing schemes and wiles of insiders who are willing

to betray their company's interest in order to enrich themselves." **Surowitz v. Hilton Hotels Corporation,** 34 Law Week 4196, 4198, 86 S. Ct. 845, 850.

Rule 52.08(b), which is identical in the respect here under consideration to Rule 23(b), must be considered as having an identical purpose. Yet, it has here been construed to deny a hearing upon the merits to very substantial stockholders, and solely because, as petitioners agree, they cannot allege that Mr. Busch and the directors own and control an actual majority of the stock of a corporation which had 16,024 stockholders as of November 30, 1962 (Stip. Par. 2(O)). In **Surowitz,** this Court held:

> "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23(b), like the other civil rules was written to further, not defeat the end of justice." 34 Law Week 4196, 4198-9, 83 S. Ct. 845, 851.

The basic purpose stated is not only the basic purpose of the Federal Rules, it is the basic purpose of the due process clause of Amendment XIV.

If the dismissal of Surowitz's bona fide complaint through procedural booby traps without an adjudication of the merits is not the working of "an honest and fair judicial system", then the similar dismissal of the Saighs' bona fide petition through procedural booby traps without a hearing, but *with* an adverse adjudication on the

merits, is even less the workings of "an honest and fair judicial system".

And if petitioners have been deprived of their rights by the working of a judicial system which is neither honest nor fair, be it Federal or State, they have been deprived of due process of law, which as American citizens they are entitled to under U. S. Constitution Amendment XIV.

CONCLUSION.

Wherefore, petitioners pray for the issuance of a writ of certiorari to the St. Louis Court of Appeals.

Respectfully submitted,

LON HOCKER,
411 North Seventh Street,
St. Louis, Missouri 63101,
MAin 1-6100,
Attorney for Petitioners.

Of Counsel:
HOCKER, GOODWIN & MacGREEVY,
411 North Seventh Street,
St. Louis, Missouri 63101,
MAin 1-6100.